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Supreme Court, U.S.
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In the
Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

KIRBY L. WHITE,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a police officer must have a reasonable suspicion, as defined in *Terry v. Ohio*, to question a lawfully detained operator of a motor vehicle about matters unrelated to the basis of the stop.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the People of the State of Illinois, respectfully asks this Court to issue a writ of certiorari to the Appellate Court of Illinois, Second Judicial District, to review that court's judgment and opinion entered on May 24, 2002.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District, is reported at 331 Ill.App.3d 22, 770 N.E.2d 261 (2nd Dist. 2002). The decision is reprinted in the appendix to this petition.

JURISDICTION

The Appellate Court of Illinois, Second Judicial District, entered its decision on May 24, 2002, affirming the order of the Circuit Court of DuPage County, Illinois suppressing certain evidence. No petition for rehearing was filed in the Appellate Court. A timely petition for leave to appeal to the Supreme Court of Illinois was denied on October 2, 2002. It is reprinted in the appendix to this petition. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Based on evidence seized as the result of a traffic stop, Respondent, Kirby L. White, was charged in the Circuit Court of the Second Judicial District, DuPage County, Illinois with the offenses of Forgery (for forging the name "Willie Wheaton" to a legal document) and Theft by Deception. (C. 4-5). Prior to trial, Respondent filed a motion to quash arrest and suppress evidence, alleging that the questioning of the defendant about matters unrelated to the basis for the vehicle stop exceeded the scope of that stop, in violation of the 4th and 14th Amendments of the United States Constitution. (C. 36).

At the hearing on respondent's motion, Robert Lee, a Naperville, Illinois police detective, testified that, while on patrol on July 1, 1998, he observed a station wagon fail to signal while changing lanes. Upon observing this traffic violation, Lee initiated a stop of the vehicle. (C. 75-76). While approaching Respondent's vehicle, Lee observed a "weed wacker [sic]" and a lawn-mower in the back part of the station wagon. (C. 77). Lee identified himself to Respondent (who was the driver), and asked for his license and insurance. (C. 77). Respondent initially identified himself as Stanley Smith, and advised the officer that while he did not have an Illinois license, he claimed he was a licensed driver in Arkansas. (C. 78). Lee asked Respondent whether he had any receipts for the items observed in the vehicle, and Lee saw that the name appearing on a receipt produced by Respondent was "Willie Wheaton." (C. 78-79).

Lee had Respondent exit the vehicle while Lee checked with dispatch to ascertain the validity of "Stanley Smith's" licensure in Arkansas. (C. 82). During the approximately three to five minute wait for a response from dispatch (C. 83), Respondent made a number of purportedly incriminating statements in relation to "the forgery at Sears" that

concerned the ownership and possession of the weed-whacker and lawn mower. (C. 89).

While finding that the vehicle stop and ensuing driver's license inquiry were valid (C. 97), the circuit court found that the conversation between Lee and Respondent while awaiting a response from dispatch was "not casual conversation that you would suspect of summer days." (C. 98). Accordingly, the court suppressed any statements made by Respondent during this three to five minute time frame. (C. 98). On August 29, 2000, the circuit court denied Petitioner's motion to reconsider. (C. 108).

On May 24, 2002, the Illinois Appellate Court, Second Judicial District, issued an opinion affirming the suppression of Respondent's statements. The court concluded that under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), a vehicle stop must be limited in both scope and duration, and that the scope of the vehicle stop was unjustifiably expanded when questions were raised by the officer that were unrelated to the circumstances that initially justified the vehicle stop. *People v. White*, 331 Ill.App.3d 22, 770 N.E.2d 261, 271 (2nd Dist. 2002). On October 2, 2002, the Illinois Supreme Court denied Petitioner's petition for leave to appeal.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW, RAISING AN ISSUE UPON WHICH FEDERAL AND STATE COURTS ARE IN CONFLICT, SIGNIFICANTLY UNDERMINES LEGITIMATE LAW ENFORCEMENT PRACTICES AND COMPROMISES OFFICER SAFETY; UNDULY ATTACHES FOURTH AMENDMENT SIGNIFICANCE TO MERE QUESTIONS POSED BY AN OFFICER DURING A LAWFUL STOP, QUESTIONS WHICH, IN AND OF THEMSELVES, NEITHER PROLONG THE STOP NOR EXPAND ITS SCOPE AS THE TERM "SCOPE" IS UNDERSTOOD IN *TERRY v. OHIO;* AND IS INCOMPATIBLE WITH THIS COURT'S OPINION IN *WHREN v. UNITED STATES.*

The court below held that an individual who is being lawfully detained for a violation of the traffic code may not be questioned on any matters unrelated to the basis for the stop unless the officer can articulate a reasonable suspicion justifying such questioning. *People v. White*, 331 Ill.App.3d 22, 770 N.E.2d 261, 271 (2nd Dist. 2002). The court's ruling encompassed even those situations where the officer's questions may relate to his or her own personal security, such as whether the stopped motorist is carrying a weapon in the vehicle. *White*, 331 Ill.App.3d at 34. While the court's ruling finds some support in the authority it cites, it is nevertheless, as explained below, in substantial conflict with decisions of both the federal courts and other state courts. Moreover, the court's decision maintains that mere questioning has Fourth Amendment significance even where it is manifest that the questioning neither prolonged the duration of the stop, nor involved any expansion of the otherwise lawful intrusion into Respondent's Fourth Amendment-protected zone of privacy. Accordingly, the court's legal premise that mere questioning about matters unrelated to the basis for the detention expanded the scope of the stop is fundamentally flawed, and should be reversed.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), this Court observed that a search and seizure which is reason-

able in its inception may violate the Fourth Amendment by virtue of its "intolerable intensity and scope." *Terry*, 392 U.S. at 18. A vehicle stop has been defined by this Court as being analogous to a *Terry* stop. *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 3150 (1984). Hence, the primary considerations in determining whether a search and seizure were unreasonable during the course of a vehicle stop are whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry*, 392 U.S. at 19-20. In the stop-and-frisk scenario addressed in *Terry*, this Court first examined whether the stop of the defendant—the initial seizure—was justified at the outset. This Court concluded that, given the suspicious nature of the actions of the defendant, the initial detention was justified. *Terry*, 392 U.S. at 28. Turning then to the "scope" of the encounter, which in *Terry* was a frisk of the defendant's person, this Court noted that it did not exceed that which was reasonable under the circumstances, namely, that the officer did not place his hands in the defendant's pockets or invade the defendant's person beyond the outer surfaces of his clothes. *Terry*, 392 U.S. at 29. Hence, one seeking to define "scope" as meant by this Court in *Terry* would be inclined to understand that the term refers to the boundaries of the physical intrusion. Indeed, the term "scope" does not have any textual significance in the Fourth Amendment itself, and accordingly only finds its existence as the product of a judicially crafted rule allowing brief detentions and searches allowing an officer to allay suspicion of possible criminal activity in the absence of probable cause justifying a full custodial detention.

This Court has not yet answered the question whether the scope of a *Terry* stop which, if justified at the outset and involves no amount of physical invasion beyond that which was permitted under the facts which allowed the stop at its

outset, is nonetheless exceeded if the undeniably non-physically obtrusive act of a "question" is posed to a detained individual. While this Court has repeatedly emphasized that the investigative methods employed during a *Terry* stop should be the "least intrusive" means to verify or dispel the officer's reasonable suspicion (*Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325 (1983)), the concept that "scope" and "intrusiveness" are interchangeable terms relating solely to the *physical* dynamics of the citizen-police encounter does find its place in this Court's decisions. For example, in *Royer*, this Court agreed that, based upon certain information the officers had at their disposal, the officers were justified in temporarily detaining Royer and his luggage until they were able to verify or dispel their suspicions "in a manner that did not exceed the limits of an investigative detention." *Royer*, 460 U.S. at 502. It may be reasonably assumed that the "limits" of an investigative detention is a synonym for the detention's "scope." However, Royer was then escorted to a small room where the police officers essentially interrogated him, and he was never informed that he was free to board the airplane if he so chose. *Royer*, 460 U.S. at 502-03. This Court deemed the detention to be "a more serious *intrusion* on his personal liberty than is allowable on mere suspicion of criminal activity." *Royer*, 460 U.S. at 502 (emphasis added). Hence, the "scope" of the detention, read as the degree of the intrusion imposed upon the defendant's Fourth Amendment liberty interests, was exceeded when the investigating officers physically forced Royer into an interrogation room and held him against his will while officers attempted to extract more information from him. It was the expansion of the scope of the detention which this Court deemed to violate the limitations of *Terry*.

Similarly, in *Illinois v. McArthur*, 531 U.S. 326, 121 S.Ct. 946 (2001), this Court considered whether the police

violated the Fourth Amendment when, during a time period when the police were attempting to secure a search warrant for a residence, they did not permit the defendant to re-enter his residence unless a police officer accompanied him. *McArthur*, 531 U.S. at 329. The Illinois circuit court suppressed the evidence on the grounds that the defendant was illegally seized, and the appellate court affirmed. *McArthur*, 531 U.S. at 330. This Court reversed, noting that a warrantless seizure of an individual may be permitted based upon a pressing law enforcement "need," and that "the restraint at issue was tailored to that need, being limited in time and *scope*, cf. *Terry v. Ohio*, 392 U.S. at 29-30, 88 S.Ct. 1868, and avoiding significant intrusion into the home itself. [citation omitted]." *McArthur*, 531 U.S. at 331 (italics added). This Court's reference to the "scope" of the detention in *McArthur*, coupled with its reference to *Terry*, and when viewed against the factual background of the case, suggests that the scope of the defendant's detention was to be framed by the parameters of the defendant's physical restraint. Indeed, this Court may have reached a different result in *McArthur* had the "scope" of the detention been more excessive, such as transportation of the defendant to the police station or other overt police action retraining McArthur's liberty such as handcuffing.

Other decisions of this Court have similarly discussed the scope of a *Terry* detention in terms of its physical attributes. *See United States v. Sharpe*, 470 U.S. 675, 688, 105 S.Ct. 1568, 1576, (1985) (The "scope" of the detention was not improperly expanded merely because the defendants were detained for 30-40 minutes); *United States v. Hensley*, 469 U.S. 221, 234-35, 105 S.Ct. 675, 683 (1985) (If a police bulletin justifies a stop, then the scope of the stop may encompass the time necessary to confirm the existence of the facts giving rise to the basis for the stop, and the time necessary to seize evidence in plain view). Importantly,

however, this Court has yet to elevate the mere posing of a question to the level of an actual physical intrusion, and in fact has suggested just the opposite. *See Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382 (1991) (One is not seized by the police merely because the officer asks a question).

The closest this Court has come to discussing the impact of questions in a *Terry* stop scenario is *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975), a case heavily relied upon by the Illinois Appellate Court. *White*, 331 Ill.App.3d at 29. In deciding whether Border Patrol officers were justified in stopping vehicles to determine the citizenship of their occupants, this Court, analogizing the vehicle stop in question to a *Terry* stop, noted that "the stop and *inquiry* must be 'reasonably related in scope to the justification for their initiation' [citing *Terry*]", and that "[t]he officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *Brignoni-Ponce*, 422 U.S. at 881-882 (emphasis added). The Illinois Appellate Court's belief that this Court was equating "inquiry" with "scope" is misplaced. In a superficial sense, such a conclusion does not comport with the grammatical structure of the above-quoted passage, in that substituting "scope" for "inquiry" in the above passage would result in saying that the stop and *scope* must reasonably relate in *scope* to the justification for their initiation, which is both a nonsensical sentence and a hopeless redundancy. Rather, the reference to "inquiry" relates to (and is coextensive with) the length of the detention, namely, that the stop and related questions must not unduly delay the detention past the time needed to allay the officer's initial suspicions concerning the vehicle occupants' citizenship. Thus, in that sense the "inquiry" became part and parcel of the physical scope (length of detention) of the

stop, in that the length of the detention was tied to the manner and content of the inquiry posed to the stopped individuals. Such cannot be a consideration given the facts in the present petition, where the question posed by the officer had no bearing whatsoever on the length or physical intrusiveness of the vehicle stop. And in any event, by no means did this Court express the view that an inquiry *standing alone* expands the scope of a *Terry* stop unless it *also* expands the length or *physical* intrusiveness of the seizure itself.

However, the meaning of the term "scope" has occasioned significant conflict among the federal and state courts in attempting to resolve whether an officer's questioning of a lawfully stopped motorist violates the Fourth Amendment if the questioning is unrelated to the basis for the stop, and the physical intrusiveness of the stop itself is not otherwise altered by the mere question. In *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993), the defendants, after having been stopped for speeding and while awaiting the results of a computer check, were individually questioned. The result of this questioning prompted the officers to obtain consent to search the vehicle. *Shabazz*, 993 F.2d at 433. The court rejected the premise that the questioning, which was unrelated to the basis for the stop, impermissibly exceeded the scope of the detention, observing that it was the "detention, not questioning, [which] is the evil at which *Terry's* [scope] prong is aimed." *Shabazz*, 993 F.3d at 437. Because the officers' questioning occurred during the time they were still awaiting word of the driver's license check, the detention at that point continued to be supported by the facts that justified its initiation. *Shabazz*, 993 F.3d at 437. The Court of Appeals in *Shabazz* appropriately noted that the "length of the detention," which was the physical manifestation of the detention itself, was the "scope" of the detention and that the questions themselves had no significance in

the context of this scope unless they altered the physical dimensions of the stop.

Other federal circuit courts have voiced their agreement with *Shabazz*. *See United States v. Purcell*, 236 F.3d 1274, 1279-80 (11th Cir. 2001); *see also United States v. Childs*, 277 F.3d 947, 950-51 (7th Cir. 2002). The *en banc* Court of Appeals in *Childs* recognized that questions in and of themselves do not result in a *seizure*, and any counter-argument in a situation similar to Respondent's would be nonsensical in that a question asked of someone already "seized" cannot possibly result in a separate, legally distinguishable seizure. *Childs*, 277 F.3d at 950. Only when the questioning has a material impact on the physical characteristic of the seizure, such as prolonging its length, does the questioning take on any Fourth Amendment significance. *Childs*, 277 F.3d at 950-52.

Other courts, however, have chosen to find that questioning unrelated to the basis for the stop, even if the physical characteristics of the stop itself remain unaltered, violate the Fourth Amendment. *See United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994); *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001). And state courts of review are similarly deeply divided on the issue. *Compare State v. Parkinson*, 135 Idaho 357, 17 P.3d 301 (2000); *State v. Allende*, 791 So. 2d 589 (2001); *State v. Amaya*, 176 Ore. App. 35, 29 P.2d 1177 (2001); *State v. Gaulrapp*, 207 Wis.2d 600, 558 N.W.2d 696 (1996); *State v. Hickman*, 335 N.J.Super. 623, 763 A.2d 330 (2000); *People v. Brown*, 62 Cal.App.4th 493, 72 Cal.Rptr.2d 793 (1998) (no Fourth Amendment violation) *with State v. Gibbons*, 258 Ga.App. 859, 547 S.E.2d 679 (2001); *State v. Mitchell*, 265 Kan. 238, 960 P.2d 200 (1998); *State v. Taylor*, 126 N.M. 569, 973 P.2d 246 (App. 1998).

As a result, there is a pervasive conflict among state and federal jurisdictions about the powers of the police and the

means by which they can effectuate valid law enforcement objectives, or even what measures police can pursue to ensure their safety at the scene of a traffic stop. The conflict in Illinois alone is particularly glaring, in that depending upon which court hears the prosecution of an offense, the exact same conduct by the police in the instant case would be condemned and the evidence suppressed in an Illinois state court of law (as a result of the instant case), but would be deemed entirely permissible if the case were prosecuted in federal court located in Illinois (as a result of the decision in *Childs*). Moreover, the decision of the appellate court in the instant case is difficult to reconcile with this Court's decision in *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769 (1996), wherein this Court stated that the motivations of individual officers in effecting traffic stops are irrelevant provided that the officers had a valid constitutional basis to stop the vehicle. *Whren*, 517 U.S. at 813-814. It makes little sense to say that an officer's subjective intentions in making a traffic stop are not relevant provided that there otherwise exist reasonable grounds to permit the stop, but in the same Fourth Amendment context say that those same officers have no means by which to explore these subjective intentions once that traffic stop had been made.

Because of the gravity of the question as it relates to law enforcement, the patent conflict in the state and federal courts, and the very real likelihood of disparate results depending on the venue of prosecution, this Court should grant this petition, reverse the judgment of the Illinois courts, and remand this cause for further proceedings.

CONCLUSION

For the foregoing reasons, the Petitioner, the People of the State of Illinois, respectfully requests that this Honorable Court grant *Certiorari*, reverse the judgment of the lower courts, and remand this cause for trial.

Respectfully submitted,

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APPENDIX

App. 1

[Dated May 24, 2002]

No. 2–00–1386

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of DuPage County.
Plaintiff-Appellant,	)	
v.	)	
	)	No. 98-CF-2217
KIRBY L. WHITE,	)	Honorable Perry R. Thompson, Judge, Presiding.
Defendant-Appellee.	)	

JUSTICE GROMETER delivered the opinion of the court:

In November 1998, defendant, Kirby L. White, was indicted for the offenses of forgery (720 ILCS 5/17-3(a)(2) (West 1998)) and theft by deception (720 ILCS 5/16-1(a)(2)(A) (West 1998)). The indictments alleged, in essence, that, on July 1, 1998, defendant delivered a check to an employee of Sears bearing the forged signature of Willie Wheaton to obtain by deception a lawn mower and weed whacker having a total value in excess of $300.

Defendant filed a motion to quash arrest and suppress evidence. The motion claimed that the warrantless detention of defendant by police in order to inquire about the items in the car (the items) was unrelated to the original basis for the traffic stop and exceeded the legal scope of

that stop and that the detention violated defendant's right to be free from unreasonable searches and seizures as guaranteed by the provisions of the federal and state constitutions (U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6). Defendant sought to suppress certain physical evidence as well as the statements he made as a result of the detention.

After a suppression hearing on July 28, 2000, the trial court suppressed defendant's statements related to the items, but not the physical evidence, which the court believed ultimately would have been discovered pursuant to an inventory search. The State's motion to reconsider was denied, and the State has timely appealed. See 188 Ill.2d R. 604(a)(1).

On appeal, the State argues that the trial court appears to have made its ruling based on its misperception that there was a *Miranda* violation. The State asserts that it has found no authority that prohibits *per se* an officer from making inquiries during the course of a valid traffic stop that are unrelated to the reason for the stop, provided the stop and the length of the detention are otherwise lawful. The State further asserts that, because there was no factual basis for the trial court's ruling on *Miranda* grounds and the court ruled in the State's favor on fourth amendment grounds, there is nothing for this court to do but reverse the judgment and remand the cause. Even though the trial court denied the State's motion to reconsider, including a request to put on more evidence regarding defendant's statements—particularly with respect to the *Miranda* issue—the State now specifically requests that this cause *not* be remanded for an evidentiary hearing on the *Miranda* issue because defendant never validly raised a fifth amendment claim.

Defendant argues that the State incorrectly assumes that the suppression order was premised on a finding of a

Miranda violation. Defendant argues that this court should affirm the order suppressing the statements made by defendant because the record shows that the arresting officer violated the fourth amendment by questioning defendant about matters wholly unrelated to the stop thereby transforming a valid traffic stop into an unreasonable seizure. The parties cite apparently conflicting cases regarding whether, absent reasonable suspicion, the questioning of a detained motorist by police about matters wholly unrelated to the purpose of the traffic stop transforms the stop into an unreasonable stop because the questioning exceeds the purpose or scope of the stop. See, *e.g.*, *United States v. Childs*, 277 F.3d 947 (7th Cir.2002) (rehearing *en banc*) (officer did not render detention of passenger for seat belt violation unreasonable by asking questions unrelated to that charge); *United States v. Holt*, 264 F.3d 1215 (10th Cir.2001) (rehearing *en banc*) (majority holding by Ebel, J., that during routine traffic stop officer may ask motorist whether there is a loaded firearm in the car even in absence of particularized suspicion; majority holding by Briscoe, J., that reasonableness of traffic stop must be judged by examining both *scope* and *duration* of detention; criticizing *United States v. Shabazz*, 993 F.2d 431 (5th Cir.1993) (questioning by officer, even on matters unrelated to purpose of stop, does not cause stop to become more intrusive unless questioning extends duration of stop)). Defendant does not challenge the trial court's order denying the suppression of the physical evidence, and the initial legal justification for the traffic stop is not disputed by either party. For the reasons that we shall explain, the police questioning rendered the detention unreasonable, at least in part, and defendant's statements resulting from that part of the detention must be suppressed. We affirm the suppression order.

At the suppression hearing, Detective Robert Lee of the Naperville police department testified that on July 1, 1998, he stopped a brown Mercury Grand Marquis station wagon

because the driver (defendant) failed to signal while changing lanes. Lee activated his squad car's emergency lights, and the station wagon pulled over. When Lee walked over to the vehicle, he observed a lawn mower and a weed whacker in the back of the vehicle. He asked to see defendant's driver's license and proof of insurance and informed him of the reason for the stop. Defendant identified himself as Stanley Smith and informed Lee that he did not have an Illinois driver's license; however, he did currently possess an Arkansas driver's license. The next thing Lee did was to ask defendant if he had any receipts for the items Lee observed in the back of the station wagon. Defendant gave him the receipts. The name on the receipts was Willie Wheaton. Lee inquired about Willie Wheaton and also asked defendant where the items came from.

Lee asked defendant to exit the vehicle, escorted defendant to the rear of the car, and conducted a computer check of defendant's driver's license. Defendant was not free to leave. They waited for about three to five minutes for the results of the computer check. Lee had no information regarding any crime concerning the lawn mower and the weed whacker. The dispatcher informed Lee that defendant's Arkansas license was suspended. Lee asked for a backup. When the backup arrived, defendant was placed under arrest for driving with a suspended license. Defendant and his car were searched. An Illinois state agency identification card and numerous checkbooks were recovered from the car.

Defendant also made additional statements to Lee while waiting for the license check result, which showed that defendant's license was suspended. When defense counsel asked Lee whether the additional statements were made regarding the ownership and possession of the lawn mower and weed whacker, Lee answered, "Yes, the forgery at Sears." After defendant was arrested, Lee learned that defendant's name was Kirby White.

The trial court ruled that the initial stop was lawful. However, with respect to the statements made during the time period from the stop to the return of the license check, the court stated that "this is not casual conversation that you would suspect of the summer days." The court suppressed defendant's statements made as the result of the officer's questioning but did not suppress the physical evidence.

Initially, we address the issue first raised by the State: whether the court's ruling was based on a violation of the *Miranda* rule. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Under the *Miranda* rule, the prosecution may not use statements arising from the custodial interrogation of a defendant unless certain procedural safeguards have been used to secure the defendant's fifth amendment privilege against self-incrimination. These safeguards include warning the person that he has a right to remain silent; that any statement he makes may be used as evidence against him; and that he has the right to the presence of an attorney, either retained or appointed. Here, the trial court did not make its initial ruling based on a *Miranda* violation, although it is clear that the court found the questioning impermissible. In ruling on the motion to reconsider, the court did refer to a case concerning an unlawful interrogation where a *Miranda* warning was given and where the questioning was designed to elicit an incriminating response. See *People v. Elliot*, 314 Ill.App.3d 187 (2000). However, in *Elliot*, the custody itself was found to be unlawful because there was no probable cause to arrest.

Here, the trial court made it clear that the statements were suppressed because they were unrelated to the purpose of the traffic stop. Defendant concedes that the statements were not obtained in violation of *Miranda* because defendant was not yet in custody but was merely detained

at the time. See *Berkemer v. McCarty*, 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138 (1984) (the usual traffic stop is more analogous to a *Terry* stop than to a formal arrest, and the motorist is not in custody for *Miranda* purposes). Since defendant was not in custody at the time of the questioning, a *Miranda* analysis is irrelevant here. We thus next consider whether the police questioning unrelated to the purpose of the stop rendered a portion of the detention unreasonable under the fourth amendment because the questioning exceeded the scope of the stop.

When a trial court's ruling on the lawfulness of a search or seizure involves factual determinations or credibility assessments, the decision will be reversed on appeal only if it is manifestly erroneous. However, when there is no factual or credibility dispute and the question involves only the application of the law to the undisputed facts, our review is *de novo*. *People v. Robinson*, 322 Ill.App.3d 169, 172-73 (2001). Since the issue here is essentially a legal one, our review is *de novo*.

A limited investigatory stop or seizure by the police is permissible only when based upon reasonable and articulable suspicion of criminal conduct, that is, when the officer reasonably infers from all the facts and circumstances that the person has committed or is about to commit a crime. See *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968); *People v. Ertl*, 292 Ill.App.3d 863, 868 (1997). The ultimate test of the constitutionality of a search or seizure is reasonableness, and the inquiry concerns whether the officer's conduct was reasonable under the circumstances known to the officer at the time the stop was initiated; the officer's inferences must be based on more substantial facts than would support a mere hunch. *Ertl*, 292 Ill.App.3d at 868. The reasonableness of the police conduct depends upon balancing the public's interest and the individual's right to personal security free from arbi-

trary interference by law officers. *Ertl*, 292 Ill.App.3d at 869.

A routine traffic stop or investigative detention is generally analyzed under the *Terry* standard. *Berkemer*, 468 U.S. at 439, 82 L.Ed.2d at 334, 104 S.Ct. at 3150 (traffic stop is analogous to *Terry* stop); *People v. Brownlee*, 186 Ill.2d 501 (1999) (analyzing reasonableness of traffic stop under *Terry* standard). As the *Brownlee* court explained, the "Court in *Terry* set forth a dual inquiry for deciding whether an officer's investigative detention is reasonable: (1) 'whether the officer's action was justified at its inception' and (2) 'whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Brownlee*, 186 Ill.2d at 518-19, quoting *Terry*, 392 U.S. at 19-20, 20 L.Ed.2d at 905, 88 S.Ct. at 1879. The *Brownlee* court explained that the principles applicable to the second prong of this judicial inquiry were further elaborated on in *Florida v. Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S.Ct. 1319 (1983) (plurality opinion). In *Royer*, the Court stated that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop" and it is "the State's burden to demonstrate that the seizure it seeks to justify * * * was sufficiently limited in *scope* and *duration* to satisfy the conditions of an investigative seizure." (Emphasis added.) *Royer*, 460 U.S. at 500, 75 L.Ed.2d at 238, 103 S.Ct. at 1325-26 ; see *Brownlee*, 186 Ill.2d at 519. *Brownlee* further determined that where an officer's confinement of a person goes beyond the limited restraints of a *Terry* stop, a subsequent consent to search may be found to be tainted by the illegality of the detention. *Brownlee*, 186 Ill.2d at 519.

In *Brownlee*, our supreme court held that the State failed to show that the officers' extended detention of the car's occupants after the initial purpose of the traffic stop was concluded was in any way reasonable or objectively justified

or that the detention was sufficiently limited in scope or duration. The State thus waived the right to contest the trial court's determination that the evidence against the defendant must be suppressed. *Brownlee* typifies the case where a detention becomes unreasonable principally because the duration of the stop, even though brief, is unjustifiably extended without reasonable suspicion.

In this case, we are more concerned with the scope rather than the duration of the detention. We must decide whether the questioning about the items in the back of the car was reasonably related in scope to the circumstances that justified the interference in the first place, absent reasonable suspicion to conduct this type of questioning. Because of its facts, this case appears to present a question of first impression in this jurisdiction, and we have considered conflicting opinions from other jurisdictions. We conclude that the questioning about the ownership of the goods, which was clearly intended to elicit possibly incriminating responses about a matter wholly unrelated to the traffic stop, was not reasonably related in scope to the purpose of the stop. Furthermore, the facts clearly establish that the officer had no independent reasonable and articulable suspicion to support this type of intrusion upon the privacy of the motorist.

This case was foreshadowed, by analogy, in *People v. Ross*, 289 Ill.App.3d 1013 (1997). In *Ross*, the defendant was charged with the unlawful use of a weapon. Following a routine traffic stop for running a red stoplight, officers discovered a gun in the backseat of the defendant's car after questioning him about whether he had a gun in the car. The reviewing court considered whether the officer's actions following the stop were reasonably related in scope to the circumstances which justified the interference in the first place. The reviewing court concluded that when the defendant produced a firearm identification card upon being

stopped, this created an independent basis to expand the officer's initial stop because it was reasonable for the officers to assume that defendant had a gun and there was a reasonable concern for the officers' safety. The court held that when the police reasonably suspect the presence of a gun at a traffic stop, they may ask about its whereabouts without violating the fourth amendment.

In *United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed.2d 607, 95 S.Ct. 2574 (1975), the Court considered whether the fourth amendment limited the authority of federal agents to detain automobiles near the Mexican border in order to question the occupants about their citizenship and immigration status. Relying on *Terry*, the Court held that such detentions are permitted where the agents reasonably suspect that the occupants are illegal aliens. In so doing, the court stated that "the stop and *inquiry* must be 'reasonably related in scope to the justification for their initiation.'" (Emphasis added.) *Brignoni-Ponce*, 422 U.S. at 881, 45 L.Ed.2d at 617, 95 S.Ct. at 2580, quoting *Terry*, 392 U.S. at 29, 20 L.Ed.2d at 910, 88 S.Ct. at 1884.

In *United States v. Holt*, 229 F.3d 931 (10th Cir.2000), the defendant, Dennis Holt, was stopped at a driver's license checkpoint. Officer Damon Tucker observed that Holt was not wearing a seat belt. Tucker asked Holt to exit the truck and join him in the patrol car. Tucker obtained Holt's license and began to write a warning. While doing so, but before completing the task, Tucker asked Holt whether there was anything he should know about in Holt's vehicle, such as loaded weapons or other items. Holt stated he knew what Tucker was referring to but he did not use "them" (drugs) anymore. Upon further questioning, Holt indicated he had previously used drugs but had not been involved with them for about a year or so. Tucker then asked to search Holt's vehicle, and Holt agreed. The officer pro-

ceeded to search the truck and found a loaded pistol. Drug paraphernalia was also found and Holt was eventually charged with drug offenses. Holt successfully moved to suppress his responses to the officer's questions and the evidence that was seized.

A divided panel of the reviewing court affirmed the trial court's suppression order. The panel concluded that Tucker exceeded the reasonable scope of the detention by questioning Holt about the possession of contraband while Tucker was writing the warning where the questioning was unrelated to the purpose of the stop and was not prompted by a reasonable suspicion of illegal activity or motivated by safety concerns.

Upon rehearing (*United States v. Holt*, 264 F.3d 1215 (10th Cir.2001) (rehearing *en banc*) (*Holt* II)), two separate majorities concluded that a *Terry* analysis applies to traffic stops and that *Terry* requires an analysis of both the scope and duration of a stop to determine whether the stop comports with the fourth amendment requirement of reasonableness. The court assessed the reasonableness of the traffic stop "by considering the scope of the officer's actions and balancing the motorist's legitimate expectation of privacy against the government's law-enforcement-related interests." *Holt II*, 264 F.3d at 1220.

In contrast to the original panel's opinion, however, a majority of the court also concluded that an officer may ask the driver about the presence of *loaded* weapons in the absence of particularized, reasonable suspicion. A minority rejected this bright-line rule, pointing out that there was no evidence that Holt was armed and dangerous and implying that this was an unwarranted expansion of *Terry*, which only permits a limited search for weapons where there is a reasonable suspicion that the driver is armed and dangerous. *Holt*, 264 F.3d at 1230-36 (Briscoe, J., joined in parts III and IV by Seymour, Lucero, and Murphy, JJ.).

Holt II also rejected the government's position, as exemplified by *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993), that, as long as the officer's interrogation or questioning does not unreasonably extend the length of the stop, the fourth amendment is not implicated. The *Holt II* court refused to abandon the "scope" limitation of *Terry* and look only to the duration of the stop. *Holt II*, 264 F.3d at 1228.

In *Shabazz*, police officers stopped a car driven by Shabazz for speeding. Parker, a passenger, was the owner of the car. While running a computer check on Shabazz's license, the officers questioned Shabazz and Parker individually concerning their recent whereabouts. Based on conflicts in the detainees' stories, the officers sought and received consent from Parker to search the car. The police found cocaine secreted in an air conditioner vent, and Shabazz and Parker were arrested, charged with drug offenses, and convicted. On appeal, the defendants argued that the officers exceeded the reasonable scope of the original purpose of the stop when they were questioned about their recent whereabouts. Although the court recognized that under appropriate circumstances extensive questioning about matters wholly unrelated to the purpose of a routine traffic stop may violate the fourth amendment (citing *United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir. 1993) (*dictum*)), the Fifth Circuit rejected "any notion that a police officer's questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation." *Shabazz*, 993 F.2d at 436. The *Shabazz* court noted that the questioning occurred while the officers were waiting for the results of the computer check and thus did nothing to extend the duration of the initial, valid seizure, and the detention to that point continued to be supported by the facts that justified its initiation. The court ultimately found that the search was consensual. *Shabazz*, 993 F.2d at 437, 439. *Shabazz* suggests that scope is coextensive with duration.

The *Holt II* court found *Shabazz* unpersuasive because that court relied heavily on the Supreme Court's statement in *Florida v. Bostick*, 501 U.S. 429, 434, 115 L.Ed.2d 389, 398, 111 S.Ct. 2382, 2386 (1991), that mere police questioning does not constitute a seizure. According to *Holt* II, the problem with that statement is that it was made by the Court in determining whether the random questioning of bus passengers by police constituted a seizure and concluding that such encounters were consensual and not seizures. The Court did not address the issue raised in *Shabazz*—whether in the context of a nonconsensual police-citizen encounter, police questioning on matters unrelated to the purposes of the initial stop can be so intrusive as to violate the fourth amendment. *Holt II*, 264 F.3d at 1229. The *Holt II* court made it clear that scope and duration were entirely separate dimensions of a traffic stop for analytical purposes.

In *United States v. Childs*, 277 F.3d 947 (7th Cir.2002) (rehearing *en banc*), the defendant, Tommie Childs, was a passenger in a car stopped for an obstructed windshield. He was not wearing a seat belt. The car had been stopped before. While Officer James Chiola's partner was running a license and warrant check on the driver, Chiola asked Childs about the windshield (Childs said it was not his car), whether he was carrying marijuana this time (Childs said no), and whether he would consent to a search (Childs agreed). During the search, Chiola found crack cocaine. Childs was prosecuted for a drug offense and was convicted. On appeal, the original panel had held that the second question effected an unconstitutional seizure because the traffic stop was unrelated to drugs and Chiola had no reason to think that Childs was carrying drugs.

Relying on *Florida v. Bostick* and other Supreme Court decisions, the *en banc* court determined that, because questions are neither searches nor seizures, the police need

not demonstrate justification for each inquiry even though the person is detained or in custody; the court noted that the detainee may refuse to answer. The court agreed with *Shabazz* and concluded that questions during traffic stops are not seizures and thus do not require probable cause or reasonable suspicion. The court did recognize, however, that *questioning* may render the physical detention unreasonable, especially where it is unjustified and prolongs the detention. The court concluded that one question about marijuana was not unreasonable and that the consent to search was voluntary. *Childs*, 277 F.3d at 950-52.

The *Childs* court was also aware that other federal circuit courts have held that police questions must have some reasonable relation to the stop or be supported by some independent source of reasonable suspicion to be lawful. See *United States v. Murillo*, 255 F.3d 1169 (9th Cir.2001) (during traffic stop, police may ask questions reasonably related in scope to the basis for the stop; in order to broaden scope of questioning, officer must articulate particularized and objective suspicious factors); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir.1994) (reasonable investigation after traffic stop may include asking for driver's license and registration, requesting driver to sit in patrol car, and asking driver about destination and purpose; and if reasonably related questions raise inconsistent answers or license and registration do not check out, officer's suspicions may be raised so as to enable him to expand scope of stop and ask more intrusive questions; where no objective circumstances supply officer with additional suspicion, officer should not expand scope of stop). See also *United States v. Perez*, 37 F.3d 510 (9th Cir.1994) (questions asked during investigative stop must be reasonably related in scope to the basis for the inquiry; questions were based on reasonable suspicion under circumstances presented and consent to search was voluntary); *United States v. Barahona*, 990 F.2d 412 (8th Cir.1993) (similar rule).

In *Childs*, Judge Cudahy concurred with the result because he thought there was reasonable suspicion that Childs possessed marijuana. However, Judge Cudahy agreed with *Holt's* view that both the scope and duration of a stop or seizure must be part of the reasonableness inquiry and that the duration of the stop cannot be the only dimension of reasonableness (as suggested by *Shabazz*). Thus, the police may not ask questions unrelated to the purpose of the traffic stop unless there is an independent source of reasonable suspicion. *Childs*, 277 F.3d at 956 (Cudahy, J., concurring). Judge Cudahy found inapplicable the proposition relied on by the majority and often stated by the Supreme Court (such as in *Bostick*)—that mere questioning by police does not constitute a seizure—since that rule has been applied to the police questioning of undetained persons in public places and the encounters were presumably consensual. *Childs*, 277 F.3d at 957 (Cudahy, J., concurring) (and cases cited therein).

Some state reviewing courts have recently held that questioning during a traffic stop (before the purpose of the detention is satisfied) that is not reasonably related to the original purpose of the stop exceeds the scope of the investigation and renders the detention unreasonable under the fourth amendment unless there is a reasonable suspicion of other criminal activity. See, *e.g.*, *State v. Gibbons*, 248 Ga.App. 859, 547 S.E.2d 679 (2001) (during stop for seat belt violation, officer's questions unrelated to stop, including questions about drugs and weapons while officer held driver's license, rendered stop unreasonable and subsequent consent to search was invalid); *State v. Mitchell*, 265 Kan. 238, 960 P.2d 200 (1998) (detention of defendant was unreasonable where defendant was stopped for speeding and officer, after checking license and registration and, without reasonable suspicion, asked a number of questions, including questions about prior arrests and drugs, and asked permission to search car rather than issuing

ticket or warning and giving defendant an opportunity to leave); *State v. Taylor*, 126 N.M. 569, 973 P.2d 246 (App. 1998) (police impermissibly expanded scope of detention for littering when, during warrant check, while holding license and without reasonable suspicion, police asked questions unrelated to stop about presence of illegal drugs, alcohol, and guns, asked to search car, and defendant agreed; consent was invalid; police are not entitled to go on fishing expeditions simply because the investigation is continued while waiting for the results of the warrant check). Other jurisdictions have reached opposite conclusions. See, *e.g.*, *State v. Hickman*, 335 N.J.Super. 623, 763 A.2d 330 (2000) (relying in part on *Shabazz*); *State v. Gaulrapp*, 207 Wis.2d 600, 558 N.W.2d 696 (1996) (relying in part on *Shabazz*).

Because of the widespread abuse of existing law that allows the police to obtain consent searches of every motor vehicle stopped for even the most minor traffic violations, the New Jersey Supreme Court has just decided, under that state's constitutional provisions similar to those of the fourth amendment, that an officer may not request consent to search a vehicle during a routine traffic stop unless there is articulable suspicion that the search will uncover evidence of a crime. *State v. Carty*, 170 N.J. 632, 790 A.2d 903 (2002). The *Carty* court explained that it is virtually impossible to drive and not unwittingly commit some infraction of the motor vehicle laws. Thus a substantial number of drivers are at risk of being pulled over and asked by officers for consent to search their vehicles at the officers' discretion, and motorists may sacrifice their right to privacy and consent to a search in order to escape with only a warning. The court cited empirical studies showing that, although 95% of motorists consented to searches (based on requests that were sometimes intimidating), 4 out of 5 persons who submitted to consensual searches were innocent of any wrongdoing. The court held that a suspicionless consensual search would be deemed unconstitu-

tional *whether it preceded or followed the completion of the traffic stop* so as to prevent the police from turning a routine traffic stop into a fishing expedition. *Carty*, 170 N.J. at 647, 790 A.2d at 912. While this decision is based principally on state rather than federal search and seizure law, it is nevertheless instructive, at least by analogy.

Based on our review of the case law, we hold that a *Terry* analysis generally applies to the ordinary traffic stop and that *Terry* requires that the reasonableness of the stop must be analyzed with respect to both the scope of the stop (including its intrusiveness) and its duration. Scope and duration are two different dimensions of the *Terry* analysis. Thus we reject the suggestion by *Shabazz* that scope and duration are coextensive. See *Holt II*, 264 F.3d at 1228-29. Moreover, we disagree with that part of *Holt II* holding an officer may inquire about loaded weapons without a reasonable suspicion that the detainee may be armed and dangerous. See *People v. Ross*, 289 Ill.App.3d 1013 (1997) (requiring reasonable suspicion). While a police officer making a lawful stop of a motorist is not precluded from making reasonable inquiries concerning the purpose of the stop, the scope of the activities and questioning by the police during an investigatory detention must be reasonably related to the circumstances that initially justified the stop. See *Perez*, 37 F.3d at 513. An officer may expand the scope of his detention beyond that which is reasonably related to the circumstances only when the officer has a reasonable and articulable suspicion that other criminal activity may be afoot or where matters that arise during the course of the stop cause the officer reasonable suspicion. See *Taylor*, 126 N.M. at 575-76, 973 P.2d at 252-53. Questioning wholly unrelated to the purposes of the stop, which is reasonably calculated to elicit incriminating responses, is impermissible unless supported by independent, reasonable, and articulable suspicion.

Nothing in this decision prohibits an officer from questioning a person on any subject during an ordinary consensual police-citizen encounter that does not rise to the level of a stop or seizure. However, when a person is effectively restrained, such as during an investigatory stop, then "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500, 75 L.Ed.2d at 238, 103 S.Ct. at 1325-26.

Here, the officer's questions regarding the ownership of the items in the car were intrusive and calculated to elicit possibly incriminating responses. They were wholly unrelated to the purpose of the traffic stop and were unsupported by independent reasonable suspicion. Other than the traffic violation, the defendant was doing nothing unusual to indicate that other criminal activity was afoot. The police are not entitled to go on fishing expeditions to satisfy their curiosity or their hunches while waiting for the results of the computer check. The State has failed in its burden to demonstrate that this part of the detention was sufficiently limited in scope that it satisfied the conditions of the investigative seizure. See *People v. Brownlee*, 186 Ill.2d 501, 519 (1999). The trial court's suppression order must be affirmed.

The judgment of the circuit court of DuPage County is affirmed, and the cause is remanded for further proceedings.

Affirmed and remanded.

McLAREN and BOWMAN, JJ., concur.

(Letterhead of)

SUPREME COURT OF ILLINOIS
94222 CLERK OF THE COURT
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SPRINGFIELD, ILLINOIS 62701
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October 2, 2002

Mr. Stephen E. Norris
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No. 94222 – People State of Illinois, petitioner, v. Kirby L. White, respondent. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 2002.